

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR  
CONSTITUTIONAL RIGHTS, PHYSICIANS FOR HUMAN  
RIGHTS, VETERANS FOR COMMON SENSE AND  
VETERANS FOR PEACE,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, AND ITS COMPONENTS  
DEPARTMENT OF ARMY, DEPARTMENT OF NAVY,  
DEPARTMENT OF AIR FORCE, DEFENSE INTELLIGENCE  
AGENCY; DEPARTMENT OF HOMELAND SECURITY;  
DEPARTMENT OF JUSTICE, AND ITS COMPONENTS  
CIVIL RIGHTS DIVISION, CRIMINAL DIVISION, OFFICE  
OF INFORMATION AND PRIVACY, OFFICE OF  
INTELLIGENCE, POLICY AND REVIEW, FEDERAL  
BUREAU OF INVESTIGATION; DEPARTMENT OF STATE;  
AND CENTRAL INTELLIGENCE AGENCY,

Defendants.

DOCKET NO. 04-CV-4151 (AKH)

DECLARATION OF  
MARCO SASSÒLI

*Document Electronically Filed*

Marco Sassòli, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am professor of international law at the University of Geneva, Switzerland, and associate professor of international law at the University of Québec in Montreal, Canada. I am also President of the University Center for International Humanitarian Law in Geneva. From 1985 to 1997 I worked with the International Committee of the Red Cross (ICRC), both in the field and at the organization's headquarters in Geneva. While at the ICRC, I served as, inter alia, deputy head of the organization's legal division. I am the author of a treatise, *How Does Law Protect in War* (ICRC, 1999), and numerous academic articles about the Geneva Conventions and international humanitarian law.

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2. The purpose of this declaration is to provide an analysis of certain aspects of the Geneva Convention Relative to the Treatment of Prisoners of War ("Third Geneva Convention") and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention").

3. It is my understanding that this litigation concerns plaintiffs' request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for, among other things, records concerning the abuse of detainees held by the United States in, Iraq, Afghanistan, and/or Guantánamo Bay. I also understand that some of the records responsive to plaintiffs' FOIA request are photographs and videotapes that depict detainees being abused (collectively, "Photographs").

4. I have been informed that the issue before the court is whether the release of the Photographs would be consistent with the United States' obligations under the Third and Fourth Geneva Conventions.

5. For the following reasons, I believe that the release of the Photographs would not be contrary to the Geneva Conventions if the Photographs were altered to ensure that the prisoners depicted would not be individually recognizable.

#### **FINDINGS OF DECLARANT**

6. The Geneva Conventions are intended first and foremost to ensure that prisoners are treated humanely. In reflection of this intent, the Third Geneva Convention, which protects "prisoners of war," states that such prisoners "must at all times be humanely treated" and "at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity." See Third Geneva Convention,

Art. 13. The Fourth Geneva Convention affords similar protection to all those who “find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” See Fourth Geneva Convention, Art. 27.

7. Because the United States, Afghanistan, and Iraq are states party to the Third and Fourth Geneva Conventions, “persons having committed belligerent acts” against United States forces in connection with the conflicts in Afghanistan and Iraq and having fallen into the power of the United States are presumptively entitled to protection under the Third Geneva Convention. See Third Geneva Convention, Art. 5. Other individuals detained by the United States in connection with these conflicts are entitled to protection under the Fourth Geneva Convention if they are enemy or neutral nationals.

8. As defendants invoke Article 13 of the Third Geneva Convention and Article 27 of the Fourth Geneva Conventions as a rationale for withholding the Photographs, defendants apparently acknowledge that the individuals depicted in the Photographs are entitled to the protection of one or the other of the Conventions. I am in agreement with the defendants on this point.

9. The prisoners depicted in the Photographs must be protected from insult and public curiosity. This does not mean, however, that the Photographs cannot be released at all. Article 13 of the Third Geneva Convention and Article 27 of the Fourth Geneva Convention have been construed by states party and by the ICRC to prohibit the dissemination of photographs in which prisoners of war or protected persons are individually identifiable. The Conventions do not categorically prohibit the dissemination of photographs of prisoners being abused.

10. The declaration of Edward R. Cummings, submitted by defendants in this litigation, states without citation that the ICRC takes the position that Article 13 of the Third Geneva Convention categorically prohibits states party from disseminating photographs that show prisoners of war in degrading or humiliating positions. See Declaration of Edward R. Cummings, ¶ 17. In fact, as discussed below, ICRC officials have taken the position that such photographs may be disseminated if faces and identifying features are obscured.

11. In 1991, the British Red Cross Society (BRCS) submitted a draft resolution to the 26<sup>th</sup> International Conference of the Red Cross and Red Crescent interpreting Article 13 of the Third Geneva Convention. The resolution construed Article 13 “as prohibiting the public transmission of images of prisoners of war as individuals, but not forbidding the public transmission of images of prisoners of war who cannot be individually recognized.” See Risius & Meyer, supra (emphasis added). The BRCS resolution specifically recognized “the important role of the media in helping to ensure respect for international humanitarian law.” Id.

12. More recently, the ICRC was asked to comment on photographs of prisoners being abused by American forces in Iraq. In response, an ICRC spokesperson stated that such photographs may be released if faces and identifying features are obscured. See Pics “not breaching convention,” South Africa News (May 21, 2004) (attached hereto as Exhibit A).

13. The Geneva Conventions’ proscription against exposing prisoners to “insult and public curiosity” reflects a concern for the prisoner as individual. See Risius & Meyer, supra (noting that BRCS construction of Article 13 “is concerned with prisoners

of war as individuals [and] reflects the understanding . . . that Article 13 is designed to protect individual honour”) (emphases added); ICRC, Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, p.200 (stating that Article 27 of the Fourth Geneva Convention reflects “the principle of respect for the human person and the inviolable character of the basic rights of individual men and women”) (emphasis added); *id.* p.201 (stating that Article 27 “covers all the rights of the individual”) (emphasis added).

14. In my view, the proscription against exposing prisoners to “insult and public curiosity” does not mean that photographs of prisoners being abused may not be disseminated at all. Rather, it means that photographs of prisoners being abused may not be disseminated if they depict prisoners who are individually recognizable. I am not aware of any academic commentator who has taken a contrary position.

15. The Declaration of Geoffrey S. Corn, submitted by defendants in this litigation, states that the dissemination of the Photographs “would clearly subject the individuals depicted to public curiosity” because “it is almost inconceivable that release of such photographs would not generate renewed public curiosity related to the details depicted in the photographs.” See Declaration of Geoffrey S. Corn, ¶ 11. “Public curiosity,” however, must be distinguished from public concern. It is probably true that the dissemination of the photographs will generate renewed public concern for prisoners held by United States forces – and, indeed, for prisoners of war and protected persons more generally. The possibility that the Photographs will generate public concern, however, does not mean that their dissemination will violate the Geneva Conventions. In my opinion, it is highly unlikely that those who view the Photographs will view them

with disdain or contempt towards the prisoners depicted. On the contrary, the dissemination of the Photographs is likely to elicit concern for the prisoners depicted and for the treatment of prisoners of war and protected persons more generally.

16. For these reasons, I believe that the dissemination of the Photographs would be not be contrary to with the Geneva Conventions if they were altered to ensure that the prisoners depicted would not be individually recognizable.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28<sup>th</sup> day of April, 2005.

A handwritten signature in black ink, appearing to read 'M. Sassoli', is written over a horizontal line.

MARCO SASSOLI  
Professeur, Département de droit international public  
Faculté de droit  
UNI MAIL  
Bd du Pont-d'Arve 40  
1211 Genève 4  
Switzerland

## **Exhibit A**

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World - Iraq

**Pics 'not breaching convention'**

21/05/2004 20:56 - (SA)

Geneva - Releasing further photographs of prisoners being abused by United States forces in Iraq probably wouldn't breach the Geneva Conventions as long as the inmates couldn't be identified, the international Red Cross said on Friday.

Florian Westphal, spokesperson for the International Committee of the Red Cross, said: "My interpretation would be that you are not exposing them to 'public curiosity' if their faces are obscured."

The Geneva Conventions on the conduct of war ban exposing prisoners of war to "public curiosity".

US defence secretary Donald Rumsfeld has said this regulation would forbid the government from distributing photographs that show Iraqi detainees being humiliated or abused at Baghdad's Abu Ghraib Prison.

Westphal declined to comment directly on whether Rumsfeld could release all the pictures provided the faces of the detainees were obscured, but said that "blurring faces might be a good way" to ensure that detainees can't be recognised in pictures.

**Cornered inmate is cowering**

The Washington Post on Friday published new photographs of prisoner abuse in Abu Ghraib, but Westphal said the paper had not breached the Geneva Conventions even though the face of one detainee was clearly visible, because only governments were bound by the treaties.

It is up to governments to pass the sort of legislation that would prevent the media from publishing photos that breached the Geneva Conventions, he said.

In the Washington Post's front-page photo, a cornered inmate is cowering in the face of a US soldier restraining a large black dog. The inmate's face is clearly visible.

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In other pictures, however, faces are obscured, blurred or hidden by hoods.

The photographs include images of a US soldier apparently preparing to strike a shackled detainee and a hooded inmate collapsed with his wrists handcuffed to the railing.

Another shows a baton-wielding soldier appearing to order a naked detainee covered in a brown substance to walk a straight line, although his ankles are shackled.

"What we say is that in order to protect the dignity of detainees, they should not be shown to public curiosity," said ICRC spokesperson Nada Doumani, speaking from Amman, Jordan.

"But we aren't going to make a big story of this. The problem now is not in publishing the picture as much as in what has happened in the prison."

**Never comments on conditions in prisons**

The neutral, Swiss-run ICRC is designated in the Geneva Conventions as their guardian, and ICRC delegates visit detainees across the globe.

The agency often speaks out on the legality of government actions under international humanitarian law, but never comments on the conditions it finds in prisons in order to ensure continued access.

Earlier this month, however, an ICRC report on conditions in Iraqi prisons was leaked, and the agency acknowledged that it had been demanding improvements for more than a year.

Coalition forces have met some of the demands, but others remain a concern, it said.

*Edited by Tisha Steyn*

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